Supreme Court, U.S.
FILED

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No. _____

IN THE

Supreme Court of the United States

October Term, 1997

ESTATE OF DONALD H. RAY, DECEASED
PATRICIA G. RAY, INDEPENDENT EXECUTRIX
AND PATRICIA RAY, CIPRIANO DOMINGUEZ,
AND THE ESTATE OF ISABEL DOMINGUEZ, DECEASED,
CIPRIANO DOMINGUEZ, INDEPENDENT EXECUTOR,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Petition For Writ Of Certiorari
To The United States Court of Appeals
for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. At what point will the Government be held responsible for the conduct of its attorneys.

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ESTATE OF DONALD H. RAY, DECEASED
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Estate of Donald H. Ray, Deceased, Patricia G. Ray, Independent Executrix, Patricia Ray, Cipriano Dominguez, and the Estate of Isabel Dominguez, Deceased, Cipriano Dominguez, Independent Executor, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 112 F.3d 194 and is reproduced verbatim in the Appendix attached hereto at pages App. 20 - App. 25, *infra*. The

Memorandum Opinion of the United States Tax Court is reported at 70 T.C.M. (CCH) 1412, and is reproduced verbatim in the Appendix attached hereto at pages App. 2 - App. 15, *infra*. The Decisions of the United States Tax Court are unreported, but are reproduced verbatim in the Appendix attached hereto at page App. 16 - App.19, *infra*.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on May 7, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(l)

STATUTORY PROVISIONS INVOLVED

The pertinent statutory provisions are reprinted in the Appendix attached hereto beginning at the following pages:

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STATEMENT OF THE CASE

This case arises from the decision of the United States Circuit Court of Appeals for the Fifth Circuit ("Fifth Circuit") to uphold the United States Tax Court's ("Tax Court") determination that a letter of offer and letter and act of acceptance between counsel for the Government and counsel for the Petitioners in a case docketed and pending before the United States Tax Court did not create a settlement and, therefore, the statute of limitations for issuing notices of deficiency did not begin to run until later when a Form 870-L(AD) partnership items settlement agreement was signed by the Internal Revenue Service ("I.R.S.").

1. Statement of the Facts.

Petitioners are the Estate of Donald H. Ray ("Mr. Ray"), Deceased, Patricia G. Ray, ("Mrs. Ray") Independent Executrix, and Patricia G. Ray (collectively "Rays"), and Cipriano Dominguez and the Estate of Isabel Dominguez ("Mrs. Dominguez"), Deceased, Cipriano Dominguez, Independent Executor (collectively "Dominguezes"). At the time the Tax Court's petitions were filed for the Rays and

Dominguezes, Mrs. Ray resided in Arlington, Texas, and the Dominguezes resided in Arlington, Texas.

In 1981, Mr. Ray, Mrs. Dominguez, and Robert F. Breese ("Breese") began investing together in various entities. Breese is a certified public accountant with a bachelor's degree in business administration in accounting; however, he does not actively practice in accounting. They formed RDB Joint Venture ("RDB"), a Texas general partnership, and Breese managed RDB's investments. Mr. Ray died in December, 1990, and prior to that time, Mrs. Ray did not actively participate in the Rays' investments. Mrs. Dominguez died in June, 1993.

For 1983 and 1984, RDB was a partner of Valley Cable, Ltd. ("Valley Cable"), a Texas limited partnership. Valley Cable was subject to the unified audit and litigation procedures set forth in Sections 6221 through 6233 (the TEFRA provisions) enacted by the Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. 97-248, Sec. 402(a), 96 Stat. 648, and amended retroactively by the Deficit Reduction Act of 1984, Pub. L. 98-369, Sec. 714(p)(1), 98 Stat. 494, 964. RDB was a pass-thru partner as defined in section 6231(a)(9). Mr. Ray, Mrs. Dominguez, and Mr. Breese were indirect partners of Valley Cable, as defined in Section 6231(a)(10), due to their ownership interests in RDB.

In 1984, Mr. Ray, Mrs. Dominguez, and Breese were also partners in 6121 Joint Venture ("6121"), a general partnership. RDB transferred its interest in Valley Cable to 6121. The I.R.S.' settlement offer and the settlement acceptance were done using the name RDB Investments II, Inc. Although RDB Investments II, Inc., was not a partner in Valley Cable during the taxable years 1983 or 1984, Ray, Dominguez, and the I.R.S. all stipulated that actions taken in the name of RDB Investments II, Inc., were intended to be treated as the actions of RDB and 6121 with respect to the taxable years 1983 and 1984, respectively. For convenience, we will refer to RDB, 6121, and RDB Investments II, Inc., as RDB.

The I.R.S. designated Valley Cable a litigation project case and assigned Valley Cable to a litigation project referred to as Southern Cable. The I.R.S. assigned Peter Palka ("Palka") as the project appeals officer and Albert Balboni ("Balboni") as the project attorney on Southern Cable. Thomas E. Redding ("Redding") was a taxpayer representative in the Southern Cable project. He is also counsel for Petitioners in this case.

On March 16, 1987, the I.R.S. issued to Valley Cable a Notice of Final Partnership Administrative Adjustment ("FPAA") for 1983. On May 9, 1988, the I.R.S. issued to Valley Cable an FPAA for 1984.

After learning that the I.R.S. was challenging the tax deductions claimed by Valley Cable, Breese took the necessary steps to include RDB in a "group" formed to challenge the I.R.S.'s determinations. Redding was counsel for that group. Victor M. Wilder ("Wilder"), Tax Matters Partner ("TMP") for Valley Cable, timely filed Tax Court petitions for readjustment of partnership items under Section 6226 with respect to Valley Cable's 1983 and 1984 taxable years. Balboni was trial counsel for the I.R.S. in that action.

In a letter dated March 25, 1991 ("Palka letter"), Palka mailed to Wilder a Form 870-L(AD), Settlement Agreement for Partnership Adjustments and Affected Items ("Form 870-L(AD)"), with a corresponding schedule of adjustments for Valley Cable's taxable year 1983. A separate Palka letter sent to Mr. Wilder dated March 25, 1991, contained a Form 870-L(AD) and corresponding schedule of adjustments for Valley Cable's taxable year 1984. RDB also received a copy of the Palka letter along with a copy of the Form 870-L(AD).

Breese reviewed the Palka letter, but it did not make sense to him at the time because it contained the following statements which did not appear correct:

> "The Appeals Office has completed settlement negotiations on the * * * [Valley Cable partnership] and the results of those negotiations are shown on the enclosed Form 870-L(AD) and attached schedule of adjustments. We believe this settlement is a fair and equitable resolution of the adjustments.
>
> "If you do not agree to the settlement of the partnership items, a notice of Final Partnership Administrative Adjustment will be mailed to you on these items. This notice will allow you to file a petition with the United States Tax Court, the Claims Court or a Federal district court where the partnership's principal place of business is located. This notice will be mailed to you if we have not heard from you within 30 days as we will assume you do not agree with the settlement.
>
> "If you wish to accept this settlement as explained above, the signed agreement form with the attached schedule of adjustments must be returned within 30 days from the date of this letter."

Breese contacted Redding and asked "what was going on." In a letter dated April 1, 1991, from Redding to Balboni, Redding highlighted

what he perceived to be inaccuracies in the Palka letter, including the statement that if the partners did not agree to the settlement of the partnership items within 30 days, an FPAA will be issued. When the Palka letter was mailed, the I.R.S. had already issued an FPAA, and the TMP for Valley Cable had already filed a petition in this Court. In a letter to Redding dated April 4, 1991, Balboni admitted that the Palka letter was computer generated, that it was incorrect, and it should not have been sent in that form. In that same letter, Balboni stated:

> "In order to clear up any potential misunderstanding caused by the [Palka] letter in these cases, I am willing to write and send a letter to each of the partners of Valley Cable, Ltd., or their known representative, **which clarifies the settlement offer and the deadline for its acceptance** [Emphasis added]."

In an attempt to clarify the Palka letter, Balboni, the trial attorney for the I.R.S., sent a letter dated April 4, 1991 ("Balboni letter"), to each of the partners of Valley Cable. The Balboni letter stated:

> CC:HOU:TL
> AABalboni
>
> R.D.B Investments II, Inc.
> 6121 Midway
> Fort Worth, Texas 76117-5341
>
> Subject: Valley Cable, Ltd., Victor Wilder,
> Tax Matters Partner
> Docket Nos. 17542-87 and 16632-88
>
> Dear Sir/Madam:
>
> **I am the attorney representing the government in the above-referenced cases.** Our records indicate that you are a partner in Valley Cable, Ltd. It has just been brought to my attention that **you have received a letter from the Austin Compliance Center which communicates an offer by the government to settle the above-referenced cases. Because that "form" letter is not entirely correct, I am taking the unusual step of writing to you in an attempt to clarify the terms of the**

settlement and also to set the final deadline for accepting the offer. If you are represented in this matter, please forward this letter to your representative at once.

The "form" letter states that if you do not agree to the settlement offer within 30 days, a Notice of Final Partnership Administrative Adjustments will be issued. This statement is incorrect because such a notice has already been issued for both the 1983 and 1984 taxable years. Both years are presently docketed before the United States Tax Court as referenced above. Although the balance of the Compliance Center letter is correct, I want to clarify the terms of the settlement, as well as the manner and time-frame for accepting the settlement.

First, the **settlement offer** that you received may appear confusing at first glance because it is embodied in a schedule of partnership adjustments. The bottom line of the **settlement offer**, however, is that all of the items reflected on your income tax returns for the taxable years 1983 and 1984 which flow from your interest in Valley Cable, Ltd. will be removed from those returns. You will be allowed an ordinary deduction in 1983 equal to your partnership percentage of ½ of the total cash invested in the partnership as determined at the partnership level.

Second, the **settlement offer** also contains certain concessions by the government with respect to the penalties which have been recommended by the Examination Division in connection with your participation in Valley Cable, Ltd. The penalties are not at issue in the partnership proceeding but be advised that **the offer to settle them will expire** at the same time as the offer for the partnership items. In due course, a statutory notice of deficiency will be issued to you for the full amount of the recommended penalties if you choose not to accept the government's offer while it is available.

Third, the **settlement offer** can only **be accepted by you** if you (and your spouse, if a joint return was filed) execute the Form 870-L(AD), previously sent to you by the Compliance Center, and forward it to Mr. Peter Palka in an envelope postmarked no later than May 6, 1991, which date is the Final **deadline for accepting the offer**. If the Form 870-L(AD) is

altered in any way, or if it is accompanied by a cover letter containing any conditions to the settlement, it will be considered **a counter-offer and therefore a rejection of the government's offer**. Mr. Palka's address is Appeals Division - I.R.S., 10850 Richmond Avenue, Suite 300, Houston Texas 77042. The settlement agreement between you and the government will be consummated only upon the execution of the Form 870-L(AD) by an authorized representative of the government.

As stated above, **the government's offer** to settle the above-referenced cases, including the penalty portion, will expire on May 6, 1991. This deadline will not be extended. However, **if a partner** of Valley Cable, Ltd. properly **accepts the offer**, by law you will be entitled to what is known as consistent settlement for a period of 60 days after the government executes that partner's Form 870-L(AD).

I sincerely hope that this letter eliminates any confusion which may have been caused by the "form" letter. As I am the attorney for the government, I expect that you will consult someone before accepting my word for all of the above. If you have any questions, however, please contact the undersigned at 713/954-1200. [Emphasis added]

Sincerely yours,

HAROLD FRIEDMAN
District Counsel

BY: /s/ Albert A. Balboni
ALBERT A. BALBONI
Attorney

When Breese received the Balboni letter, he was still overseeing RDB's investment activities.

The partners of RDB met with William Podsednik, Jr. ("Podsednik"), a certified public accountant who had advised them on various matters since 1988, to discuss what options were available and whether to accept the I.R.S.'s offer. RDB decided to accept the I.R.S.'s offer. Mrs. Ray, acting on behalf of RDB, executed the Form 870-

L(AD) on May 2, 1991. Mrs. Ray executed the Form 870-L(AD) because she held a majority interest in RDB. RDB forwarded the executed Form 870-L(AD), which applied to the 1983 and 1984 taxable years to Redding to be forwarded to the I.R.S.

Redding delivered to Palka a cover letter dated May 6, 1991, and the Form 870-L(AD) executed by Mrs. Ray as RDB's authorized representative. The relevant portion of the letter states:

> Re: Valley Cable, Ltd.: 1983-84 **Settlement Acceptance**; R.D.B. Investments II, Inc. TIN: 75-1866473
>
> Dear Mr. Palka:
>
> Pursuant to Mr. Balboni's letter of April 4, 1991, enclosed is an executed Form 870-L(AD) on behalf of the above-referenced taxpayers, **accepting the Government's settlement offer**.
>
> Please send me a copy of the fully executed 870-L(AD) as soon as it is signed on behalf of the Internal Revenue Service.
>
> Enclosed is my Power of Attorney. Please see that all further communication with the taxpayer regarding this matter is made through me. [Emphasis added]

An I.R.S. authorized representative executed the Form 870-L(AD) on December 6, 1991.

2. **Proceedings in the Tax Court.**

Contrary to the terms of the settlement, on December 4, 1992, the I.R.S. issued notices of deficiency to the Rays and Dominguezes in which the I.R.S. asserted penalties of over $75,000.00, and forced Petitioners to commence the case that has led to this Petition. On December 3, 1992, the I.R.S. assessed deficiencies attributable to the Rays for 1983 and 1984. On December 4, 1992, the I.R.S. assessed deficiencies as to the Dominguezes for 1983. On January 10, 1994, the Rays and Dominguezes each made a $5,000.00 payment to the I.R.S. which was designated as a payment of income tax for 1983.

On or about March 3, 1993, the Rays and Dominguezes each filed petitions in the Tax Court: *Estate of Donald H. Ray, Deceased, Patricia G. Ray, Independent Executrix and Patricia G. Ray*, Docket No. 4582-

93; and *Cipriano Dominguez and Isabel Dominguez*, Docket No. 4583-93. The separate cases were consolidated for trial and following briefing by the parties, on November 27, 1995, the Tax Court filed its Memorandum of Findings of Fact and Opinion. On January 31, 1996, the Tax Court entered separate decisions for each case.

In each petition, the Petitioners asserted, among other grounds for relief, that the notices of deficiency and assessments were untimely because they were made more than one (1) year after the parties had entered into a binding settlement on May 6, 1991, the date Petitioners executed and delivered the 870-L(AD) as their acceptance as instructed by I.R.S. counsel. 26 U.S.C. §6229(f). In its Memorandum Opinion, the Tax Court determined that no binding settlement occurred upon the Petitioners' acceptance of the offer, and that the statute of limitations therefore began to run from December 6, 1991, the date the Form 870-L(AD) was countersigned by the I.R.S. Consequently, the Tax Court determined that the notices of deficiency were issued and the tax was assessed and paid all within the one-year statute of limitations.

3. <u>Proceedings on Appeal</u>.

On April 30, 1996, Petitioners timely filed their Notice of Appeal for the Fifth Circuit. Among other grounds, Petitioners appealed from the Tax Court's determination that the parties entered into settlement on December 6, 1991, the date the Form 870-L(AD) was countersigned by the I.R.S. Petitioners also appealed (i) from the Tax Court's determination that the statute of limitations did not bar the issuance of the notices of deficiency and assessment of the resulting penalties, and (ii) from the Tax Court's denial of the taxpayers claim for refund.

The single issue addressed by the Fifth Circuit in its written opinion was whether the settlement agreement was legally binding when the Petitioners signed and delivered their letter of acceptance and Form 870-L(AD) to Mr. Palka, or when the I.R.S. countersigned the 870-L(AD). The Fifth Circuit recognized the Tax Court's and its own prior precedent which established that an exchange of letters between counsel can a create binding settlement. *Haiduk v. Commissioner*, 60 T.C.M. (CCH) 864 (1990); *Treaty Pines Investments Partnership v. Commissioner*, 967 F.2d 206 (5th Cir. 1992). However, the Court analogized the facts and law in this case to an earlier unpublished Fifth Circuit Opinion, *Brookstone Corp. v. United States*, 58 F.3d 637 (5th Cir. 1995) (*per curium*) (*unpublished*). In *Brookstone*, the Court determined that the operative settlement document was the Form 870-

L(AD). *Brookstone*, however, did not involve a docketed case, a written settlement offer by Government trial counsel, or formal acceptance of the Government trial lawyer's settlement offer as instructed in the offer. Using the *Brookstone* analysis, the Court was not persuaded that the Balboni letter was an offer of settlement and relied solely on the Form 870-L(AD) in determining when settlement occurred.

REASONS FOR GRANTING THE PETITION

This case represents an egregious instance where I.R.S. counsel who had ultimate settlement authority for the Government in a docketed case unequivocally submitted a written settlement offer to taxpayers and was then allowed to recast that offer as a mere solicitation of an offer by the taxpayers or as a settlement "proposal," after the taxpayers received and accepted the offer. This revisionist history has relieved the I.R.S. of its own error in not making a timely assessment and permitted the I.R.S. to force the taxpayers to defend against penalties the government attorney stated would be conceded in the settlement if the taxpayers timely accepted. The I.R.S. has been relieved of all consequences of the settlement, in disregard of all prior precedent regarding the binding effect of settlements entered into with Government counsel in docketed cases. The refusal of the Tax Court, and failure of the Fifth Circuit, to hold the I.R.S. to the settlement offered by an I.R.S. trial attorney makes a complete mockery out of the judicial system as a fair arbiter of disputes between citizens of this country and their government.

Various federal appellate courts have recently addressed the issue of I.R.S. "arrogance." *Cook v. United States*, 104 F.3d 886 (6th Cir. 1997) (the Court was "disturbed by a history of I.R.S. irresponsibility in honoring and respecting filing requirements which border[ed] upon an expression of arrogant immunity from executive, legislative, and judicial mandates"); *United States v. Gertner*, 65 F.3d 963 (1st Cir. 1995); *United States v. Ritchie*, 15 F.3d 592 (6th Cir. 1994). At least two circuits have admonished I.R.S. trial counsel behavior. *Id.* However, other circuits, including the Fifth Circuit, have allowed I.R.S. counsel to ignore or run roughshod over the rules of litigation procedure. It is unacceptable that taxpayers in different circuits cannot expect the I.R.S. to be held to the same standard of behavior. At issue is whether the I.R.S. as an agency of the United States government is bound by the actions of its trial counsel, or whether government attorneys are free to engage in any level of slovenly or intentionally

misleading conduct and be exonerated at the expense of United States citizens.

The egregiousness of the I.R.S. attorney's behavior in this case can only be appreciated with an understanding of tax litigation procedure. Different settlement procedures apply to docketed and non-docketed tax cases. In non-docketed cases, settlement can only be effectuated as set forth by statute. The settlement must be memorialized using I.R.S. approved forms, such as the Form 870-L(AD) at issue. In controversies not pending in court, a written settlement agreement must be executed to create a binding settlement.

In contrast, the Petitioners' tax dispute was docketed at the time settlement was contemplated and concluded. Established tax litigation precedent dictates that the effect of the Balboni letter and the related materials were to be decided under the law regarding settlements in docketed cases and general principles of contract construction. *Treaty Pines, supra*; *Haiduk, supra*; *Himmelwright v. Commissioner*, 55 T.C.M. (CCH) 403 (1988); *Robbins Tire and Rubber Co. v. Commissioner*, 52 T.C. 420 (1969). The Tax Court and the Fifth Circuit have both held that an offer and acceptance sufficient to satisfy the requirements of basic contract law is sufficient to constitute a binding settlement of a case pending before the Tax Court. *Treaty Pines, supra; Haiduk, supra.* Letters between trial counsel have been held to be valid binding offers and acceptances in docketed cases. *Id.* Furthermore, docketed tax cases may be decided without any particular form of memorialization. *Id.* At trial and on appeal, the Tax Court ignored, and the Fifth Circuit failed to address, the paramount importance of the actions taken by counsel for the parties in docketed litigation.

This case demonstrates the disturbing regularity with which the courts have permitted government counsel to get away with conduct that would not have been tolerated from taxpayers' counsel. There is little or no doubt that had Ray or Dominguez cried "foul" and tried to repudiate that any settlement had occurred, or even withdrawn the 870-L(AD) before it was countersigned, the Balboni letter and the May 6 acceptance would have been held to be binding. *See, Tompkins v. Commissioner*, [Dec. 45,864 (M)], T.C. Memo 1989-363 (settlement offer by Commissioner's appeals officer accepted by taxpayer's counsel enforced over taxpayer objection).

In this case, the Government's attorney (Balboni) and the I.R.S. project appeals officer (Palka) were both confronted with affidavits they had filed in one of the related Southern Cable cases. They testified in their prior affidavits that Southern Cable related settlements were

intended to be consistent in form and application among the various partnerships involved, including Valley Cable. In this case they testified on the stand that the settlements in Valley Cable were intended to be treated differently than those of the prior partnership case. Nevertheless, their testimony was given full credence by the Tax Court. Under similar circumstances, taxpayers' counsel would have been sanctioned or even held to have committed perjury. As discussed above, some of the Circuit Courts of Appeal are becoming increasingly concerned about allowing this cavalier and arrogant disregard of judicial procedure and precedent by government counsel. *Cook, supra.; Gertner, supra; Ritchie, supra.*

Similarly, the Circuit Courts have found it necessary to remind the Tax Court that it is supposed to be a neutral forum for impartially resolving disputes between taxpayers and their government. *Guenther v. Commissioner*, 939 F.2d 758 (9th Cir. 1991) ("[W]e will not approve the tax court's [sic] move toward a more inquisitorial proceeding.. The violation of Guenther's due process right entitles them to a new trial in the tax court [sic]."). Even the Fifth Circuit has acknowledged that the Tax Court is not protector of the "fisc" from the government's own errors and mistakes. *Treaty Pines, supra* ("While we acknowledge that the fisc of the Nation should be protected when proer to do so, protection at the expense of the taxpayer's rights is quite improper."); and *Bouterie v. Commissioner*, 36 F.3d 1361 (5th Cir. 1994) ("In light of the foregoing analysis and other recent jurisprudence of this circuit addressing the application of §7430, we entreat the Tax Court henceforth to be a bit less chary when considering taxpayer's claims under that section.").

As Justice Scalia observed in his concurrence in *United States v. Burke*, [92-1 U.S.T.C. ¶50, 254] 112 S.Ct. 1867 (1992), our judicial system is designed to function as an adversarial system, not a system where the court functions as an inquisitor. The admonition by the Ninth Circuit in *Guenther* cited above, was not a mere passing comment. In the Tax Court the rules automatically favor the Government by placing the burden of proof on the taxpayers and giving the I.R.S.'s determinations a presumption of correctness. With this we do not argue. However, once those advantages are given to the Government, to ensure a fair trial under our system, it is critical that the rules of the adversarial system be followed. This has been severely eroded by the Tax Court's tolerance of slovenly conduct by the Government's lawyers, by that Court frequently acting as if it were guardian of the fisc, and by sitting Tax Court judges more and more frequently engaging in their

own questioning of the witnesses, often to strengthen shortcomings in a government attorney's performance as an advocate.

CONCLUSION

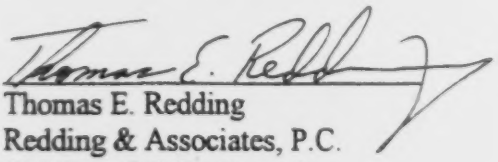
If the Fifth Circuit's opinion is not overturned, in the future taxpayers and their representatives will have to hold suspect any settlement offer contained in a letter from the Government's attorney in a docketed partnership level proceeding. The Government's attorneys in such cases could send with impunity settlement offers to opposing parties, solicit their acceptance, and later repudiate such settlement based on the allegation that the partners should have known that the Government's attorney did not have the authority to bind the Government to such settlement terms.

In the end, the real question this Court is asked to answer in this case is: When will the I.R.S. be held responsible for its own sloppy and arrogant behavior when its attorney purports to offer a settlement based on multiple misrepresentations, arrogantly ignores established precedent regarding settlements, allows the stature of limitations on assessment to expire, and then tries to offer false, if not perjured, testimony at trial? Although the Fifth Circuit Court of Appeals seems willing to accept this kind of conduct, clearly the First, Sixth and Ninth Circuits would not have.

For all of the reasons stated in this Petition, Certiorari should be granted.

Redding & Associates, P.C.

Date: August 6, 1997



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APPENDIX TO
PETITION FOR WRIT OF CERTIORARI

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Verbatim reproductions of:

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2. *Estate of Donald H. Ray, Deceased, Patricia G. Ray, Independent Executrix, and Patricia G. Ray, Petitioners v. Commissioner of Internal Revenue, Respondent.* Unpublished Decision of the United States Tax Court . . . 17

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T.C. Memo. 1995-561

UNITED STATES TAX COURT

Estate of Donald H. Ray, Deceased, Patricia G. Ray, Independent Executrix, and Patricia G. Ray, Petitioners v. Commissioner of Internal Revenue, Respondent

Cipriano Dominguez and the Estate of Isabel Dominguez, Deceased, Cipriano Dominguez, Independent Executor, Petitioners v. Commissioner of Internal Revenue, Respondent

Docket Nos. 4582-93, 4583-93. Filed November 27, 1995.

Thomas E. Redding for petitioners. Dennis E. Kelly, for respondent.

Memorandum Findings of Fact and Opinion

CLAPP, Judge: Respondent determined additions to petitioners' Federal income taxes as follows:

Docket No. 4582-93 - Estate of Donald H. Ray, Deceased, Patricia G. Ray, Independent Executrix, and Patricia G. Ray:

	Additions to Tax				
Year	*Sec. 6651(a)*	*Sec. 6653(a)(1)*	*Sec. 6653(a)(2)*	*Sec. 6659*	*Sec. 6661**
1983	---	$1,489.00	$27,843.54	$8,936.00	$7,447.00
1984	$249.00	3,932.00	1,351.00	539.00	---

* Determined as an alternative to sec. 6659.

Docket No. 4583-93 - Cipriano Dominguez and the Estate of Isabel Dominguez, Deceased, Cipriano Dominguez, Independent Executor:

	Additions to Tax			
Year	*Sec. 6653(a)(1)*	*Sec. 6653(a)(2)*	*Sec. 6659*	*Sec. 6661**
1983	$782.00	$14,598.09	$4,693.00	$3,911.00

* Determined as an alternative to sec. 6659.

Respondent assessed deficiencies in income taxes attributable to the settlement of petitioners' partnership items. Separate notices of deficiency, upon which these cases are based, were issued for additions to tax. There is no dispute that petitioners settled the partnership items, and, having done so, petitioners' share of those items became nonpartnership items. Sec. 6231(b)(1)(C). The only question is whether the notices of deficiency for additions to tax were issued prior to the expiration of the applicable period of limitations for assessment. We hold that respondent issued notices of deficiency as to the additions to tax at issue in these cases prior to the expiration of the period of limitations for assessment.

All section references are to the Internal Revenue Code as in effect for the years in issue, and all Rule references are to the Tax Court Rules of Practice and Procedure.

Findings of Fact

These cases are consolidated for trial, briefing, and opinion. Some of the facts have been stipulated and are found accordingly. We incorporate by reference the stipulation of facts and attached exhibits.

Petitioners are the Estate of Donald H. Ray (Mr. Ray), Deceased, Patricia G. Ray, (Mrs. Ray) Independent Executrix, and Patricia G. Ray, and Cipriano Dominguez and the Estate of Isabel Dominguez (Mrs. Dominguez), Deceased, Cipriano Dominguez, Independent Executor. At the time the petition was filed in docket No. 4582-93, Mrs. Ray resided in Arlington, Texas. At the time the petition was filed in docket No. 4583-93, the Dominguezes resided in Arlington, Texas.

In 1981, Mr. Ray, Mrs. Dominguez, and Robert F. Breese (Breese) began investing together in various entities. Breese is a certified public accountant with a bachelor's degree in business administration in accounting; however, he does not actively practice in accounting. They formed RDB Joint Venture (RDB), a Texas

general partnership, and Breese managed RDB's investments. Mr. Ray died in December 1990, and prior to that time Mrs. Ray did not actively participate in the Rays' investments. Mrs. Dominguez died in June 1993.

RDB was a partner of Valley Cable, Ltd. (Valley Cable), a Texas limited partnership, and Valley Cable was subject to the unified audit and litigation procedures set forth in sections 6221 through 6233 (the TEFRA provisions) enacted by the Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. 97-248, sec. 402(a), 96 Stat. 648, and amended retroactively by the Deficit Reduction Act of 1984, Pub. L. 98-369, sec. 714(p)(1), 98 Stat. 494, 964. RDB was a pass-thru partner as defined in section 6231(a)(9). Mr. Ray, Mrs. Dominguez, and Breese were indirect partners of Valley Cable, as defined in section 6231(a)(10), due to their ownership interest in RDB.

In 1984, Mr. Ray, Mrs. Dominguez, and Breese were partners in 6121 Joint Venture (6121), a general partnership, and RDB transferred its interest in Valley Cable to 6121. R.D.B. Investments II, Inc., was not a partner in Valley Cable during the taxable years 1983 or 1984, and all references to R.D.B. Investments II, Inc., refer to RDB with respect to the taxable year 1983 and refer to 6121 with respect to the taxable year 1984. All actions taken in the name of R.D.B. Investments II, Inc., were intended to be treated as the actions of RDB and 6121 with respect to the taxable years 1983 and 1984, respectively. For convenience, we will refer to RDB, 6121, and R.D.B. Investments II, Inc., as RDB.

Respondent designated Valley Cable a litigation project case and assigned Valley Cable to a litigation project referred to as Southern Cable. Respondent assigned Peter Palka (Palka) as the project appeals officer and Albert Balboni (Balboni) as the project attorney on Southern Cable. Thomas E. Redding (Redding) was a taxpayer representative in the Southern Cable project, and he is also counsel for petitioners in these cases.

On March 16, 1987, respondent issued to Valley Cable a Notice of Final Partnership Administrative Adjustment (FPAA) for the taxable year 1983, and on May 9, 1988, respondent issued to Valley Cable an FPAA for the taxable year 1984. After learning that respondent was challenging the tax deductions claimed by Valley Cable, Breese took the necessary steps to include RDB in a "group"

formed to challenge respondent's determinations. Redding was counsel for that group. Victor M. Wilder (Wilder), Tax Matters Partner (TMP) for Valley Cable, timely filed petitions for readjustment of partnership items under section 6226 with respect to Valley Cable's 1983 and 1984 taxable years.

In a letter dated March 25, 1991 (Palka letter), Palka mailed to Wilder a Form 870-L(AD), Settlement Agreement for Partnership Adjustments and Affected Items (Form 870-L(AD)), with a corresponding schedule of adjustments for Valley Cable's taxable year 1983. A separate Palka letter sent to Mr. Wilder dated March 25, 1991, contained a Form 870-L(AD) and corresponding schedule of adjustments for Valley Cable's taxable year 1984. RDB also received a copy of the Palka letter along with a copy of the Form 870-L(AD). The relevant portion of the Palka letter states:

> Dear Mr. Wilder:
>
> The Appeals Office has completed settlement negotiations on the * * * [Valley Cable partnership] and the results of those negotiations are shown on the enclosed Form 870-L(AD) and attached schedule of adjustments. We believe this settlement is a fair and equitable resolution of the adjustments.
>
> As a partner in the partnership, you have the right to participate in the settlement. You may either agree to the settlement of both the penalties and the partnership items or agree to the settlement of only the partnership items. (Penalties include interest under section 6621(c) of the Internal Revenue Code.) The following instructions explain how you should sign the settlement agreement (Form 870-L(AD) to show the extent of your agreement:
>
> If you agree to both the partnership adjustments and penalties, please sign Parts I and II of Form 870-L(AD). This will allow us to close your case with finality on both the penalty and partnership items.
>
> If you agree only to the settlement of the partnership items, please sign Part I of Form 870-L(AD). This will allow us to close your case with finality for the partnership items only and will leave open any penalty issues. A separate report on the penalties will be mailed to you later which will allow you to either file a petition to the United States Tax Court or to file a protest

requesting further Appeals consideration. However, it is unlikely that the offer shown in the agreement will be changed unless you are able to submit facts not previously considered by the Appeals office.

If you do not agree to the settlement of the partnership items, a notice of Final Partnership Administrative Adjustment will be mailed to you on these items. This notice will allow you to file a petition with the United States Tax Court, the Claims Court or a Federal district court where the partnership's principal place of business is located. This notice will be mailed to you if we have not heard from you within 30 days as we will assume you do not agree with the settlement. If penalties have been asserted, they will not be included in the notice but will be included in a separate report which will be mailed to you after the partnership proceedings are concluded.

If you wish to accept this settlement as explained above, the signed agreement form with the attached schedule of adjustments must be returned within 30 days from the date of this letter. If a joint return was filed, both spouses must sign the form (see instructions on the form). The adjustments shown on the enclosed agreement form are partnership adjustments; you may determine your share of these adjustments by multiplying your percentage of partnership profit of [sic] loss times the total adjustments.

Once this settlement is accepted for the Commissioner, the service center will compute your tax liability and send you a bill for any additional amounts.

Please contact the person whose name and number are shown above if you have any questions regarding this settlement offer.

A copy of the Form 870-L(AD), parts I and II, is attached to this opinion as an Appendix.

Breese reviewed the Palka letter, but it did not make sense to him at the time, so Breese contacted Redding and asked "what was going on." In a letter dated April 1, 1991, from Redding to Balboni, Redding highlighted what he perceived to be inaccuracies in the Palka letter, including the statement that, if the partners do not agree to the settlement of the partnership items within 30 days, an FPAA will be issued. When the Palka letter was mailed, respondent had already issued an FPAA, and the TMP for Valley Cable had already

filed a petition in this Court. In a letter to Redding dated April 4, 1991, Balboni stated that the Palka letter was computer generated, that it was incorrect, and it should not have been sent in that form. In that same letter Balboni stated:

> In order to clear up any potential misunderstanding caused by the [Palka] letter in these cases, I am willing to write and send a letter to each of the partners of Valley Cable, Ltd., or their known representative, which clarifies the settlement offer and the deadline for its acceptance.

In an attempt to clarify the Palka letter, Balboni sent a letter dated April 4, 1991 (Balboni letter), to the partners of Valley Cable. That letter also was sent to Redding as counsel for Wilder. The Balboni letter stated:

> Dear Sir/Madam:
>
> I am the attorney representing the government in the above-referenced cases. Our records indicate that you are a partner in Valley Cable, Ltd. It has just been brought to my attention that you have received a letter from the Austin Compliance Center which communicates an offer by the government to settle the above-referenced cases. Because that "form" letter is not entirely correct, I am taking the unusual step of writing to you in an attempt to clarify the terms of the settlement and also to set the final deadline for accepting the offer. If you are represented in this matter, please forward this letter to your representative at once.
>
> The "form" letter states that if you do not agree to the settlement offer within 30 days, a Notice of Final Partnership Administrative Adjustments will be issued. This statement is incorrect because such a notice has already been issued for both the 1983 and 1984 taxable years. Both years are presently docketed before the United States Tax Court as referenced above. Although the balance of the Compliance Center letter is correct, I want to clarify the terms of the settlement, as well as the manner and time-frame for accepting the settlement.
>
> First, the settlement offer that you received may appear confusing at first glance because it is embodied in a schedule of partnership adjustments. The bottom line of the settlement offer, however, is that all of the items reflected on your income tax returns for the taxable years 1983 and 1984 which flow from your

interest in Valley Cable, Ltd. will be removed from those returns. You will be allowed an ordinary deduction in 1983 equal to your partnership percentage of ½ of the total cash invested in the partnership as determined at the partnership level.

Second, the settlement offer also contains certain concessions by the government with respect to the penalties which have been recommended by the Examination Division in connection with your participation in Valley Cable, Ltd. The penalties are not at issue in the partnership proceeding but be advised that the offer to settle them will expire at the same time as the offer for the partnership items. In due course, a statutory notice of deficiency will be issued to you for the full amount of the recommended penalties if you choose not to accept the government's offer while it is available.

Third, the settlement offer can only be accepted by you if you (and your spouse, if a joint return was filed) execute the Form 870-L(AD), previously sent to you by the Compliance Center, and forward it to Mr. Peter Palka in an envelope postmarked no later than May 6, 1991, which date is the Final deadline for accepting the offer. If the Form 870-L(AD) is altered in any way, or if it is accompanied by a cover letter containing any conditions to the settlement, it will be considered a counter-offer and therefore a rejection of the government's offer. Mr. Palka's address is Appeals Division - I.R.S., 10850 Richmond Avenue, Suite 300, Houston Texas 77042. The settlement agreement between you and the government will be consummated only upon the execution of the Form 870-L(AD) by an authorized representative of the government.

As stated above, the government's offer to settle the above-referenced cases, including the penalty portion, will expire on May 6, 1991. This deadline will not be extended. However, if a partner of Valley Cable, Ltd. properly accepts the offer, by law you will be entitled to what is known as consistent settlement for a period of 60 days after the government executes that partner's Form 870-L(AD).

I sincerely hope that this letter eliminates any confusion which may have been caused by the "form" letter. As I am the attorney for the government, I expect that you will consult someone before

accepting my word for all of the above. If you have any questions, however, please contact the undersigned * * * *.

When Breese received the Balboni letter, he still was overseeing RDB's investment activities.

The partners of RDB met with William Podsednik, Jr. (Podsednik), a certified public accountant who had advised them on various matters since 1988, to discuss what options were available and whether to accept respondent's proposal. RDB, through its partners, decided to "accept" respondent's proposal. Mrs. Ray, acting on behalf of RDB, executed the Form 870-L(AD) on May 2, 1991. Mrs. Ray executed the Form 870-L(AD) because she held a majority interest in RDB. RDB forwarded the executed Form 870-L(AD), which applied to the 1983 and 1984 taxable years, to Redding, who forwarded the document to respondent.

On May 6, 1991, Redding delivered to Palka a letter dated May 6, 1991. The relevant portion of the letter states:

Dear Mr. Palka:

Attached are separate envelopes containing settlement acceptances for:

1. [material redacted]

2. [material redacted]

3. R.D.B. Investments II

* * * * *

Send copies of each 870-L(AD) to me on behalf of Victor M. Wilder as the Tax Matters Partner so we can determine when each settlement is accepted and who remain partners for notice purposes, etc.

On behalf of the Tax Matters Partner, send me a copy of the first settlement accepted by the I.R.S. and your computation of the time period for tendering requests for consistent settlement offers * * *. I know several other of my clients do intend to accept but were not yet ready, or able, to submit an 870-L(AD) for various reasons.

Redding also delivered to Palka a cover letter dated May 6, 1991, and the Form 870-L(AD) executed by Mrs. Ray as RDB's authorized representative. The relevant portion of the cover letter states:

DELIVERED BY MESSENGER

Mr. Peter Palka, Appeals Officer

Internal Revenue Service

10850 Richmond Avenue, Suite 300

Houston, Texas 77042

Re: Valley Cable, Ltd.: 1983-84 Settlement Acceptance; R.D.B. Investments II, Inc.

TIN: 75-1866473

Dear Mr. Palka:

Pursuant to Mr. Balboni's letter of April 4, 1991, enclosed is an executed Form 870-L(AD) on behalf of the above-referenced taxpayers, accepting the Government's settlement offer.

Please send me a copy of the fully executed 870-L(AD) as soon as it is signed on behalf of the Internal Revenue Service.

Enclosed is my Power of Attorney. Please see that all further communication with the taxpayer regarding this matter is made through me.

Respondent's authorized representative executed the Form 870-L(AD) on December 6, 1991. Respondent assessed deficiencies in income taxes attributable to the settlement of the Valley Cable partnership items on December 3, 1992, as to the Rays' taxable years 1983 and 1984. Respondent assessed a deficiency in income tax attributable to the settlement of the Valley Cable partnership items on December 4, 1992, as to the Dominguezes' taxable year 1983. Respondent issued notices of deficiency dated December 4, 1992, determining additions to tax attributable to the Rays for the taxable years 1983 and 1984. Respondent issued a notice of deficiency dated December 4, 1992, determining additions to tax attributable to the Dominguezes for the taxable year 1983.

On January 10, 1994, the Rays and Dominguezes each made a payment in the amount of $5,000 to respondent, which was designated as a payment of income tax for the taxable year 1983.

Opinion

Under the TEFRA provisions, the tax treatment of partnership items is decided at the partnership level in a unified partnership proceeding rather than separate proceedings for each partner, *Boyd v. Commissioner*, 101 T.C. 365, 369 (1993), and "affected items", items affected by the treatment of partnership items (e.g., certain additions to tax), can only be assessed following the conclusion of the partnership proceeding. See sec. 6225(a); *Maxwell v. Commissioner*, 87 T.C. 783, 791 n.6 (1986). The assessment of tax attributable to partnership items of a partnership subject to the TEFRA provisions shall be made with respect to any partner during the period provided by sections 6229(a) through (f). A settlement agreement converts partnership items to nonpartnership items, and the partner that enters into the settlement agreement is no longer treated as a party in the partnership proceeding. Secs. 6226(d)(1)(A), 6231(b)(1)(C). The period for assessment shall not expire before 1 year after the date on which the parties enter into a settlement agreement. Sec. 6229(f). RDB, as a pass-thru partner, entered into a settlement agreement with respondent with respect to the partnership items of Valley Cable for the taxable years 1983 and 1984. The settlement agreement entered into by RDB binds indirect partners, such as the Rays and Dominguezes, with respect to the partnership items of Valley Cable. Sec. 6224(c)(1). The dispute in these cases centers on when the parties entered into the settlement agreement.

Petitioners argue that respondent made a settlement offer which they accepted when they delivered the executed Form 870-L(AD) to respondent on May 6, 1991. Respondent argues that the Form 870-L(AD) embodies the settlement agreement, and that the agreement became binding when executed by respondent's authorized representative on December 6, 1991. Respondent contends that the notices of deficiency dated December 4, 1992, were issued prior to the expiration of the period of limitations. We agree with respondent.

General contract law principles govern tax case settlements. *Robbins Tire & Rubber Co. v. Commissioner*, 52 T.C. 420, 435-436, supplemented by 53 T.C. 275 (1969); *Smith v. Commissioner*, T.C. Memo. 1991-412. Where the intent of the parties to settle is evident and the terms of the settlement are otherwise ascertainable, then a tax settlement agreement may be binding even if it consists only of letters of offer and acceptance. *Treaty Pines Invs. Partnership v.*

Commissioner, 967 F.2d 206, 211 (5th Cir. 1992); *Haiduk v. Commissioner*, T.C. Memo. 1990-506.

Petitioners argue that the Form 870-L(AD) is ambiguous as to which party is making an offer and which party is accepting the offer. Respondent argues that the Form 870-L(AD) is not ambiguous and that it constitutes the settlement agreement between the parties. Contract law principles generally direct that we look within the "four corners" of the agreement, unless it is ambiguous as to essential terms. *Rink v. Commissioner*, 100 T.C. 319, 325 (1993), affd. 47 F.3d 168 (6th Cir. 1995).

Petitioners contend that the Form 870-L(AD) is ambiguous in that it sets forth two offers: (1) An offer to enter into a settlement agreement, and (2) an offer to waive the restrictions on the assessment and collection of any deficiency. Petitioners conclude that only the second offer is subject to acceptance for the Commissioner. Specifically, petitioners argue:

> The word "offer" in the second * * * paragraph [of the Form 870-L(AD)] refers to the last use of the word "offer" in the first * * * paragraph, which is the offer to waive the restrictions on assessment and collection. Simply stated, this language meant that the assessment and collection of the agreed to liability could not take place until after the waiver of those restrictions was accepted on behalf of the Commissioner. * * * [Fn. ref. omitted.]

We find petitioners' interpretation unconvincing.

Petitioners argue that the term "undersigned", as used in the Form 870-L(AD), is ambiguous because the Form 870-L(AD) contained a signature line for both the taxpayer and respondent's representative. On May 2, 1991, when Mrs. Ray executed the Form 870-L(AD) on behalf of RDB, her signature was the only signature on the Form 870-L(AD), and she became the "undersigned". We conclude that petitioners' arguments that the Form 870-L(AD) is ambiguous are without merit.

Petitioners argue that the Palka and Balboni letters constitute an offer, and signing the Form 870-L(AD) was the specified method for accepting that offer. Respondent argues that, by signing the Form 870-L(AD), petitioners extended an offer of settlement, and respondent accepted petitioners' offer on December 6, 1991. Respondent contends that the Balboni and Palka letters solicited an

offer from petitioners and set a deadline for petitioners to submit the settlement agreement to the appeals office. The parties do not dispute that an agreement was reached, but they interpret differently the Palka letter, the Form 870-L(AD), and the Balboni letter to parallel their respective arguments as to when the agreement was reached.

The parties argue at length how we should interpret the Balboni letter, and specifically the sentence that reads: "The settlement agreement between you and the government will be consummated only upon the execution of the Form 870-L(AD) by an authorized representative of the government."

The Balboni letter must be read in light of the Form 870-L(AD), which contains the following: "the undersigned offers to enter into a settlement agreement"; "This offer is subject to acceptance for the Commissioner"; "Unless and until it is accepted, it will have no force or effect"; "If this offer is accepted for the Commissioner"; and "Date accepted for Commissioner". After considering the Balboni letter and the language in the Form 870-L(AD), we agree with respondent's interpretation. The Form 870-L(AD) provided that petitioners submit an offer to respondent. See *Gillilan v. Commissioner*, T.C. Memo. 1993-366; *H Graphics/Access, Ltd. v. Commissioner*, T.C. Memo. 1992-345; *Brookstone Corp. v. United States*, 74 AFTR 2d 6025, 94-2 USTC par. 50,474 (S.D. Tex. 1994), affd. without published opinion 58 F.3d 637 (5th Cir. 1995).

Petitioners' reliance on *Treaty Pines Invs. Partnership v. Commissioner*, 967 F.2d 206 (5th Cir. 1992), is misplaced. The court in Treaty Pines described the record as "sparse" but had before it the taxpayer's letter purporting to accept the Commissioner's settlement offer and the Internal Revenue Service's letter purporting to confirm that the taxpayer had "accepted the original settlement offer". Id. at 209, 211. Nothing reveals that the taxpayers in Treaty Pines had before them a document such as the Form 870-L(AD) that indicated no settlement would be reached until the 870-L(AD) was accepted by the Commissioner. The court held that the exchange of letters was sufficient to constitute a settlement agreement. Id. at 211.

Petitioners, on the other hand, were required to return the executed Form 870-L(AD) to respondent. Petitioners complied with this requirement. The language set forth in the Form 870-L(AD) did not coincide with petitioners' interpretation of the Balboni letter. The document that petitioners argue constitutes an acceptance, the Form

870-L(AD), is replete with statements that RDB was submitting an offer to respondent that did not become binding until accepted by respondent. After petitioners returned the executed Form 870-L(AD) to respondent, petitioners never received any confirmation analogous to the confirmation received by the taxpayers in Treaty Pines.

The terms of the Form 870-L(AD) and the circumstances under which the Palka and Balboni letters were created and exchanged belie petitioners' interpretation of those documents. There is no doubt that Balboni was not precise in his use of the terms "offer" and "acceptance". However, after reviewing the entire record, we find that the parties entered into the settlement agreement on December 6, 1991, when respondent's authorized representative executed the Form 870-L(AD). As such, we conclude that the notices of deficiency issued on December 4, 1992, were issued prior to the expiration of the applicable period of limitations.

To reflect the foregoing and the concessions by the parties,

Decisions will be entered under Rule 155.

FORM 870-L(AD)(10-90)
DATE: 03-25-91

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
SETTLEMENT AGREEMENT
FOR PARTNERSHIP ADJUSTMENTS
AND AFFECTED ITEMS

IN REPLY
REFER TO:
STOP4161:AUCC
032591-0271

TAXPAYER(S) NAME(S) AND ADDRESS
R.D.B. INVESTMENTS II, INC.
6121 MIDWAY
FORT WORTH TX 76117-5341

TIN: 75-1866473

NAME OF PARTNERSHIP
VALLEY CABLE LTD

TIN: 76-0085677
TAX YEAR ENDED: 1983 1984

PART I: OFFER OF SETTLEMENT OF PARTNERSHIP ITEMS

UNDER THE PROVISIONS OF SECTION 6224(C) OF THE INTERNAL REVENUE CODE, THE UNDERSIGNED OFFERS TO ENTER INTO A SETTLEMENT AGREEMENT WITH RESPECT TO THE DETERMINATION OF PARTNERSHIP ITEMS OF THE PARTNERSHIP FOR THE YEAR SHOWN ON THE ATTACHED SCHEDULE OF ADJUSTMENTS. THE UNDERSIGNED, IN ACCORDANCE WITH THE PROVISIONS OF SECTION 6224(B) OF THE CODE, ALSO OFFERS TO WAIVE THE RESTRICTIONS ON THE ASSESSMENT AND COLLECTION OF ANY DEFICIENCY ATTRIBUTABLE TO PARTNERSHIP ITEMS (WITH INTEREST AS REQUIRED BY LAW) PROVIDED IN SECTION 6225(A).

THIS OFFER IS SUBJECT TO ACCEPTANCE FOR THE COMMISSIONER OF THE INTERNAL REVENUE SERVICE. IT WILL TAKE EFFECT AS A WAIVER OF RESTRICTIONS ON THE DATE IT IS ACCEPTED. UNLESS AND UNTIL IT IS ACCEPTED, IT WILL HAVE NO FORCE OR EFFECT.

IF THIS OFFER IS ACCEPTED FOR THE COMMISSIONER, THE TREATMENT OF PARTNERSHIP ITEMS UNDER THIS AGREEMENT WILL NOT BE REOPENED IN THE ABSENCE OF FRAUD, MALFEASANCE, OR MISREPRESENTATION OF FACT; AND NO CLAIM FOR REFUND OR CREDIT BASED ON ANY CHANGE IN THE TREATMENT OF PARTNERSHIP ITEMS MAY BE FILED OR PROSECUTED.

SIGNATURE OF TAXPAYER — DATE

SIGNATURE OF TAXPAYER — DATE

BY (SIGNATURE AND TITLE) — DATE

FOR INTERNAL REVENUE USE ONLY

DATE ACCEPTED FOR COMMISSIONER: DEC 6 1991

OFFICE: HOUSTON APPEALS

SIGNATURE: ROCKWELL VENDEN

TITLE: ASSOCIATES CHIEF

(SEE ENCLOSED INSTRUCTIONS)

FORM 870-l(ad)(10-90)

FORM 870-L(AD)(10-90)
DATE: 03-25-91

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
SETTLEMENT AGREEMENT
FOR PARTNERSHIP ADJUSTMENTS
AND AFFECTED ITEMS

IN REPLY
REFER TO:
STOP4161:AUCC
032591-0271

TAXPAYER(S) NAME(S) AND ADDRESS
R.D.B. INVESTMENTS II, INC
6121 MIDWAY
FORT WORTH TX 76117-5341

TIN: 75-1866473

NAME OF PARTNERSHIP
VALLEY CABLE LTD

TIN: 76-0085677
TAX YEAR ENDED: 1983 1984

PART II: OFFER OF SETTLEMENT OF PENALTIES

THE UNDERSIGNED OFFERS TO ENTER INTO A SETTLEMENT AGREEMENT WITH RESPECT TO PENALTIES (ADDITIONS TO TAX) AND INTEREST UNDER SECTION 6621(C) OF THE INTERNAL REVENUE CODE, AS SHOWN ON THE ATTACHED SCHEDULE . ADJUSTMENTS. THE UNDERSIGNED, PURSUANT TO THE PROVISIONS OF SECTION 6213(D) OF THE CODE, ALSO OFFERS TO WAIVE THE RESTRICTIONS PROVIDED IN SECTION 6213(A) OF THE CODE AND TO CONSENT TO THE ASSESSMENT AND COLLECTION OF THE PENALTIES (ADDITIONS TO TAX), ATTRIBUTABLE TO THE ADJUSTMENT(S) OF THE PARTNERSHIP ITEMS, PLUS ANY INTEREST PROVIDED BY LAW.

THIS AGREEMENT WITH RESPECT TO PENALTIES (ADDITIONS TO TAX) AND INTEREST UNDER SECTION 6621(c) OF THE INTERNAL REVENUE CODE WILL NOT CONSTITUTE A SETTLEMENT AGREEMENT FOR PURPOSE OF THE CONSISTENT SETTLEMENT PROVISION OF SECTION 6224(C)(2) OF THE INTERNAL REVENUE CODE.

THIS OFFER IS SUBJECT TO ACCEPTANCE FOR THE COMMISSIONER OF THE INTERNAL REVENUE SERVICE. IT WILL TAKE EFFECT AS A WAIVER OF RESTRICTIONS ON THE DATE IT IS ACCEPTED. UNLESS AND UNTIL IT IS ACCEPTED, IT WILL HAVE NO FORE OR EFFECT.

IF THIS OFFER IS ACCEPTED FOR THE COMMISSIONER, THE TREATMENT OF THE PENALTIES AND INTEREST UNDER SECTION 6621(C) OF THE INTERNAL REVENUE CODE, AFFECTED BY THE TREATMENT OF PARTNERSHIP ITEMS UNDER THIS AGREEMENT, WILL NOT BE REOPENED IN THE ABSENCE OF FRAUD, MALFEASANCE, OR MISREPRESENTATION OF FACT, AND NO CLAIM FOR REFUND OR CREDIT BASED ON ANY CHANGE IN THE TREATMENT OF THE PENALTIES, INCLUDING INTEREST UNDER SECTION 6621(C), MAY BE FILED OR PROSECUTED.

RDB INVESTMENT II INC

SIGNATURE OF TAXPAYER — DATE

by: Patricia G. Ray, President

SIGNATURE OF TAXPAYER — DATE

BY (SIGNATURE AND TITLE) — DATE

FOR INTERNAL REVENUE USE ONLY

DATE ACCEPTED FOR COMMISSIONER: DEC 6 1991

OFFICE: HOUSTON APPEALS

SIGNATURE: ROCKWELL VENDEN

TITLE: ASSOCIATES CHIEF

(SEE ENCLOSED INSTRUCTIONS)

FORM 870-l(ad)(10-90)

UNITED STATES TAX COURT

ESTATE OF DONALD H. RAY, DECEASED, PATRICIA G. RAY, INDEPENDENT EXECUTRIX, and PATRICIA G. RAY, Petitioners,	§	
v.	§	Docket No. 4582-93
COMMISSIONER OF INTERNAL REVENUE Respondent.	§	

DECISION

Pursuant to the opinion of the Court filed November 27, 1995, and incorporating herein the computations recited in the respondent's computation statement as the findings of the Court, it is

ORDERED AND DECIDED: That there is no overpayment in income tax due to the petitioners for the taxable year 1983;

That there is no addition to tax due from the petitioners for the taxable year 1984, under the provisions of I.R.C. § 6651(a)(1);

That there is no addition to tax due from the petitioners for the taxable years 1983 and 1984, under the provisions of I.R.C. §§ 6653(a)(1) and 6653(a)(2);

That there is no addition to tax due from the petitioners for the taxable year 1983 and 1984, under the provisions of I.R.C. § 6659; and

That there is an addition to tax due from the petitioners for the taxable year 1983, under the provisions of I.R.C. §§ 6661, in the amount of $4,468.20.

/Charles E. Clapp/
Judge

Entered: /JAN 31 1996/

It is hereby stipulated that the foregoing decision is in accordance with the opinion of the Court and the respondent's computation, and that the Court may enter this decision, without prejudice to the right of either party to contest the correctness of the decision entered herein.

STUART L. BROWN
Chief Counsel
Internal Revenue Service

/s/ Thomas E. Redding
THOMAS E. REDDING
Counsel for Petitioner
Tax Court Bar No. RT0167
515 Post Oak Blvd.,
Suite 500
Houston, TX 77027
Telephone: (713) 965-9244

Date: /1-24-96/

By: /s/ Dennis M. Kelly
DENNIS M. KELLY
Senior Attorney
Tax Court Bar No. KD0226
8701 South Gessner
Suite 710
Houston, Texas 77074
Telephone:

Date: /1-24-96/

UNITED STATES TAX COURT

CIPRIANO DOMINGUEZ and THE ESTATE OF ISABEL DOMINGUEZ, INDEPENDENT EXECUTROR, Petitioners,	§	
v.	§	Docket No. 4583-93
COMMISSIONER OF INTERNAL REVENUE Respondent.	§	

DECISION

Pursuant to the opinion of the Court filed November 27, 1995, and incorporating herein the computations recited in the respondent's computation statement as the findings of the Court, it is

ORDERED AND DECIDED: That there is no overpayment in income tax due to the petitioners for the taxable year 1983;

That there is no addition to tax due from the petitioners for the taxable years 1983, under the provisions of I.R.C. §§ 6653(a)(1) and 6653(a)(2);

That there is no addition to tax due from the petitioners for the taxable year 1983, under the provisions of I.R.C. § 6659; and

That there is an addition to tax due from the petitioners for the taxable year 1983, under the provisions of I.R.C. §§ 6661, in the amount of $2,042.10.

/s/Charles E. Clapp
Judge

Entered: /JAN 31 1996/

It is hereby stipulated that the foregoing decision is in accordance with the opinion of the Court and the respondent's computation, and that the Court may enter this decision, without prejudice to the right of either party to contest the correctness of the decision entered herein.

STUART L. BROWN
Chief Counsel
Internal Revenue Service

/s/ Thomas E. Redding/
THOMAS E. REDDING
Counsel for Petitioner
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Suite 500
Houston, TX 77027
Telephone: (713) 965-9244

Date: /1-24-96/

By: /s/ Dennis M. Kelly
DENNIS M. KELLY
Senior Attorney
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8701 South Gessner
Suite 710
Houston, Texas 77074
Telephone:

Date: /1-24-96/

112 F3d 194 (5th Cir. 1997)

Estate of Donald H. Ray, Deceased;
Patricia G. Ray, Independent Executrix,
Petitioners-Appellants

v.

Commissioner of Internal Revenue,
Respondent-Appellee

Cipriano Dominguez,
Estate of Isabel Dominguez,
Petitioners-Appellants

v.

Commissioner of Internal Revenue,
Respondent-Appellee

No. 96-60322.
United States Court of Appeals,
Fifth Circuit.
May 8, 1997.

Before JONES, STEWART and DENNIS, Circuit Judges.

STEWART, Circuit Judge:

Taxpayers appeal the tax court's decision that the Commissioner of Internal Revenue Service's (IRS) notices of deficiency were not time-barred. The IRS assessed deficiencies in income taxes as to appellants' taxable years 1983 and 1984, one year after it executed a settlement agreement with taxpayers. Taxpayers assert that the one-year statute of limitations was triggered when they signed the settlement agreement, and thus the IRS's assessment was time-barred. For the following reasons, we affirm.

BACKGROUND

The facts are undisputed. During the relevant time period, 1983 and 1984 tax years, the taxpayers were partners in RDB Joint Venture ("RDB"), a Texas general partnership. RDB was a partner of Valley Cable, Ltd. ("Valley Cable"), a Texas Limited Partnership. Valley Cable was subject to the unified audit and litigation procedures set forth in §§6221 through 6233 of the Tax Code. Taxpayers were

"indirect partners" of Valley Cable, as defined in §6231(a)(10), due to their ownership interest in RDB.

The IRS audited Valley Cable. As a result of its investigation, the IRS issued Valley Cable a Notice of Final Partnership Administrative Adjustment disallowing deductions claimed by Valley Cable for the 1983 and 1984 tax years (which affected taxpayers' income tax for the 1983 and 1984 tax years). RDB challenged this determination. Subsequently, an IRS representative, Mr. Palka, mailed a letter ("Palka letter") and a Form 870-L(AD), settlement agreement to Valley Cable's Partner for tax matters, Mr. Wilder. A copy of the form and letter was sent to RDB. The letter contained several mistakes which were detected by RDB's attorney, Mr. Redding, and this was communicated to the IRS. Form 870-L(AD), however, was correct. It provided in pertinent part:

> Under the provisions of section 6224(c) of the Internal Revenue Code, the undersigned offers to enter into a settlement agreement with respect to the determination of partnership items of the partnership for the year shown on the attached schedule of adjustments. The undersigned, in accordance with the provisions of Section 6224(b) of the Code, also offers to waive the restrictions on the assessment and collection of any deficiency attributable to partnership items (with interest as required by law) provided in Section 62255(a).
>
> This offer is subject to acceptance for the Commissioner of the Internal Revenue Service. It will take effect as a waiver of restrictions on the date it is accepted. *Unless and until it is accepted, it will have no force of effect.* [Emphasis added.]

Following these instructions were three lines bearing the label "Signature of taxpayer"; below the taxpayers' signature line was a blank space, and at the bottom of the page were lines labeled: "Date accepted for the Commissioner" and "signature."

In an attempt to correct the errant Palka letter, the IRS's attorney for the case, Mr. Balboni, sent a second letter ("Balboni letter"). The letter provides in pertinent part:

> In order to clear up any potential misunderstanding caused by the [Palka] letter in these cases, I am willing to write and send a letter to each of the partners of Valley Cable, Ltd., or their known representative, which clarifies the settlement offer and the

deadline for its acceptance. . . . [T]he settlement offer can only be accepted by you if you . . . execute the Form 870-L(AD) . . . [and send it] in an envelope postmarked no later than May 6, 1991, which date is the final deadline for accepting the offer. . . . The settlement agreement between you and the government *will be consummated only upon the execution of the form 870-L(AD) by an authorized representative of the government.* [Emphasis added.]

After consultation with their CPA, RDB accepted the settlement offer. Taxpayers' counsel, Mr. Redding, executed Form 870-L(AD) on behalf of RDB and it was delivered to IRS representative Palka on May 6, 1991, the due date. A cover letter executed by Redding accompanied the Form 870-L(AD). It provided in pertinent part:

Pursuant to Mr. Balboni's letter of April 4, 1991, enclosed is an executed Form 870-L(AD) on behalf of the above-referenced taxpayers, accepting the Government's settlement offer. . . . Please send me a copy of the fully executed 870-L(AD) as soon as it is signed on behalf of the Internal Revenue Service.

The IRS's authorized representative executed the Form 870-L(AD) on December 6, 1991. Pursuant to the terms of the settlement, the IRS assessed deficiencies in income taxes on December 3, 1992, as to the Rays' taxable years 1983 and 1984 attributable to the settlement of the Valley Cable Partnership audit. The IRS did the same for the Dominguez's on the next day, December 4, 1992.

The taxpayers responded by filing petitions for redetermination of the assessed deficiencies, arguing that the one year statute of limitations period set by §6229(f) began to run when their representative signed Form 870-L(AD) on May 6, 1991, rather than on December 6, 1991 when an authorized representative of the IRS executed the Form 870-L(AD). Thus, the argument follows that the notices of deficiency mailed by the IRS on December 3-4, 1992, were not mailed within a year of the execution of the agreement on May 6, 1991, and consequently are time-barred.

After a trial, the Tax Court held that the notices of deficiency were not time-barred. The Tax Court correctly observed at the outset that the dispositive issue was "when the parties entered into a settlement agreement." The court noted that contract principles govern the settlement of tax cases. One of those principles is that an unambiguous document should be interpreted within its four corners.

The Tax Court rejected the taxpayers' arguments, finding Form 870-L(AD) unambiguous. The Tax Court also concluded that when the Balboni letter and Form 870-L(AD) are read together, it is clear that the settlement was not effective until it was accepted by the IRS.

STANDARD OF REVIEW

"Interpretation of a contract and the determination of ambiguity are questions of law, which this Court reviews de novo." *F.D.I.C. v. McFarland*, 33 F.3d 532 (5th Cir. 1994). When the trial court considers extrinsic evidence in interpreting a contract, its conclusions are reviewed under a clear error standard. *Id.*

DISCUSSION

In this appeal, we are faced with one question: Whether the settlement agreement reached by the parties was legally binding at its signing by the taxpayers or at the IRS's signing.

At the outset, we note the parties agree that a settlement was entered into and that the IRS had one year from the date it entered into the settlement agreement to assess any tax or penalties resulting from the settlement agreement. The parties disagree, however, as to when the limitations period under 26 U.S.C. §6229(f) began to run. The taxpayers contend that when they signed and returned the Form 870-L(AD), the parties then had a legally enforceable agreement. The IRS, on the other hand, contends that it was not until its authorized representative signed the Form 870-L(AD) did the parties have a legally enforceable agreement thus triggering the one-year statute of limitations. We must therefore resolve the issue of when did the statute of limitations begin to run.

We have previously held that general contract law principles govern tax settlement cases. *Treaty Pines Investments Partnership v. Commissioner*, 967 F.2d 206, 211 (5th Cir. 1992). Moreover, in the context of settlement agreements utilizing the Form 870-L(AD), we have considered the very same argument now asserted by Taxpayers. In *Brookstone Corp. v. United States*, 58 F.3d 637 (5th Cir. 1995) (per curiam) (unpublished),[1] we affirmed the district court's determination that a settlement reached between the taxpayer and the IRS was not accepted upon the taxpayer signing the Form 870-L(AD), but only when it was signed by the IRS. The Form 870-

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[1] Cited at 58 F.3d 637 (5th Cir. 1995).

L(AD) was accompanied by a transmittal letter that contained language which, if read in isolation, might be interpreted to mean it was an offer subject to acceptance by taxpayers signing it. However, we distinctly held that the operative document was the Form 870-L(AD), which was unequivocal and stated that the settlement agreement would not take effect until signed by the IRS. Thus, we rejected taxpayer's argument and affirmed the district court. *Brookstone*, slip op. at 2.

The facts of *Brookstone* are similar to the facts of the instant case and thus we follow its reasoning. We are not persuaded by the taxpayers' argument that the use of the words "offer" and "accept" in the Balboni letter constituted language of an offer for the taxpayers to accept. If we narrowly interpret the Balboni letter as controlling then we lose sight of Form 870-L(AD)'s relevance as the operative document. Balboni's letter was written as a point of clarification of the Palka letter and to reaffirm the requirements enumerated in Form 870-L(AD), but at no time was this letter to supersede the Form 870-L(AD). Nonetheless, when the documents are read together, it is quite apparent that Form 870-L(AD) is an invitation to offer which requires acceptance by the Commissioner *prior* to the settlement taking effect. *See Gillilan v. Commissioner*, 66 T.C.M. (CCH) 398, 1993 WL 311552 (1993) (Stating that taxpayers signing of Form 870-L(AD) was an offer to settle certain partnership items that could not constitute an agreement until accepted by the IRS).

Taxpayers argue that binding settlement agreements have been found to consist of exchanges of letters, such as what is present in the instant case. *See Treaty Pines, supra; Haiduk v. Commissioner*, 60 T.C.M. (CCH) 864, 1990 WL 136717 (1990). Taxpayers' argument, however, cannot overcome the presence of the Form 870-L(AD) and its unambiguous language.[2] Although taxpayers make an attempt to argue that the Form 870-L(AD) is ambiguous, the plain language of the form refutes this argument. Part I of the form (addressing partnership items) notes that "the undersigned [taxpayer] offers to enter into a settlement agreement" with respect to partnership items shown on an attached schedule. Further down on the form it states that "this offer is subject to acceptance for the Commissioner of the Internal Revenue Service. . . . Unless and until it is accepted, it will

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[2] Neither *Treaty Pines* nor *Haiduk* were addressing the existence of a formal settlement document, such as the one [870-L(AD)] present here.

have no force or affect." As *Brookstone* concluded, this language is unambiguous and therefore it is controlling. As such, the settlement agreement was entered into as a matter of law on December 6, 1991, when the IRS accepted the offer by signing the Form 870-L(AD). Thus, the IRS's assessments executed on December 3 and 4, 1992 were not time-barred.

CONCLUSION

Having found that the IRS made a timely assessment of the tax penalties at issue because it was made within one year after the IRS and the taxpayers entered into a settlement, we AFFIRM.

SEC. 6229. PERIOD OF LIMITATIONS FOR MAKING ASSESSMENTS

(f) ITEMS BECOMING NONPARTNERSHIP ITEMS.--If, before the expiration of the period otherwise provided in this section for assessing any tax imposed by subtitle A with respect to the partnership items of a partner for the partnership taxable year, such items become nonpartnership items by reason of 1 or more of the events described in subsection (b) of section 6231, the period for assessing any tax imposed by subtitle A which is attributable to such items (or any item affected by such items) shall not expire before the date which is 1 year after the date on which the items become nonpartnership items. The period described in the preceding sentence (including any extension period under this sentence) may be extended with respect to any partner by agreement entered into by the Secretary and such partner.

CC:HOU:TL
AABalboni

April 4, 1991

R.D.B Investments II, Inc.
6121 Midway
Fort Worth, Texas 76117-5341

Subject: Valley Cable, Ltd., Victor Wilder,
Tax Matters Partner
Docket Nos. 17542-87 and 16632-88

Dear Sir/Madam:

I am the attorney representing the government in the above-referenced cases. Our records indicate that you are a partner in Valley Cable, Ltd. It has just been brought to my attention that you have received a letter from the Austin Compliance Center which communicates an offer by the government to settle the above-referenced cases. Because that "form" letter is not entirely correct, I am taking the unusual step of writing to you in an attempt to clarify the terms of the settlement and also to set the final deadline for accepting the offer. If you are represented in this matter, please forward this letter to your representative at once.

The "form" letter states that if you do not agree to the settlement offer within 30 days, a Notice of Final Partnership Administrative Adjustments will be issued. This statement is incorrect because such a notice has already been issued for both the 1983 and 1984 taxable years. Both years are presently docketed before the United States Tax Court as referenced above. Although the balance of the Compliance Center letter is correct, I want to clarify the terms of the settlement, as well as the manner and time-frame for accepting the settlement.

First, the settlement offer that you received may appear confusing at first glance because it is embodied in a schedule of partnership adjustments. The bottom line of the settlement offer, however, is that all of the items reflected on your income tax returns for the taxable

years 1983 and 1984 which flow from your interest in Valley Cable, Ltd. will be removed from those returns. You will be allowed an ordinary deduction in 1983 equal to your partnership percentage of ½ of the total cash invested in the partnership as determined at the partnership level.

Second, the settlement offer also contains certain concessions by the government with respect to the penalties which have been recommended by the Examination Division in connection with your participation in Valley Cable, Ltd. The penalties are not at issue in the partnership proceeding but be advised that the offer to settle them will expire at the same time as the offer for the partnership items. In due course, a statutory notice of deficiency will be issued to you for the full amount of the recommended penalties if you choose not to accept the government's offer while it is available.

Third, the settlement offer can only be accepted by you if you (and your spouse, if a joint return was filed) execute the Form 870-L(AD), previously sent to you by the Compliance Center, and forward it to Mr. Peter Palka in an envelope postmarked no later than May 6, 1991, which date is the Final deadline for accepting the offer. If the Form 870-L(AD) is altered in any way, or if it is accompanied by a cover letter containing any conditions to the settlement, it will be considered a counter-offer and therefore a rejection of the government's offer. Mr. Palka's address is Appeals Division - I.R.S., 10850 Richmond Avenue, Suite 300, Houston Texas 77042. The settlement agreement between you and the government will be consummated only upon the execution of the Form 870-L(AD) by an authorized representative of the government.

As stated above, the government's offer to settle the above-referenced cases, including the penalty portion, will expire on May 6, 1991. This deadline will not be extended. However, if a partner of Valley Cable, Ltd. properly accepts the offer, by law you will be entitled to what is known as consistent settlement for a period of 60 days after the government executes that partner's Form 870-L(AD).

I sincerely hope that this letter eliminates any confusion which may have been caused by the "form" letter. As I am the attorney for the government, I expect that you will consult someone before

accepting my word for all of the above. If you have any questions, however, please contact the undersigned at 713/954-1200.

Sincerely yours,

HAROLD FRIEDMAN
District Counsel

BY: /s/ Albert A. Balboni

ALBERT A. BALBONI
Attorney

CERTIFICATE OF SERVICE

This is to certify that

(i) three copies of the foregoing Petition for Writ of Certiorari were mailed by certified mail, return receipt requested, on August 6, 1997, to:

Solicitor General of the United States,
Department of Justice, Room 5614
10th Street and Constitution Ave., N. W.
Washington, D. C. 20530

(ii) one copy of the foregoing Petition for Writ of Certiorari was mailed by certified mail, return receipt requested, on August 6, 1997, to Counsel for the Internal Revenue Service:

Mr. Gary R. Allen
Department of Justice, Tax Division
P. O. Box 502
Washington D. C. 20044

and,

(iii) three copies of the foregoing Petition for Writ of certiorari were mailed by certified mail, return receipt requested, on August 6, 1997, to:

Commissioner of Internal Revenue
Washington, D. C. 20224

Date: 8/6/97

Thomas E. Redding